

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DIANE M. SCHRADER-VAN NEWKIRK,)	
individually and as Next Friend of)	C.A. No. 08C-02-089 WLW
NICOLE C. VAN NEWKIRK, a minor,)	
)	
Plaintiffs,)	
)	
v.)	
)	
SHARON C. DAUBE,)	
)	
Defendant.)	

Submitted: July 8, 2011

Decided: July 13, 2011

ORDER

Upon Plaintiffs' Motion to Reopen

Denied.

Diane M. Schrader-VanNewkirk, *pro se*

Gary S. Nitsche, Esquire of Weik, Nitsche & Dougherty, Wilmington, Delaware;
attorney for Plaintiffs.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorney for
Defendant.

WITHAM, R.J.

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Plaintiff has submitted a motion, under Rule 60(b) of the Delaware Superior Court Rules of Civil Procedure, to set aside the order dismissing her case with prejudice. Oral argument was heard on July 8, 2011. The arguments of the parties having been heard and duly considered, the opinion of the Court follows.

It appears to the Court that:

1. This case stems from an automobile accident that occurred on March 7, 2006 near the intersection of South State Street and Roosevelt Avenue in Dover. Diane Schrader Van Newkirk (“Plaintiff”) and her minor daughter were traveling North on South State Street when Sharon Daube (“Defendant”) turned in front of Plaintiff’s oncoming vehicle. Plaintiff claims that she and her daughter were injured in the accident. She asserts that Defendant caused the accident by carelessly turning in front of her oncoming vehicle.
2. Trial was originally slated to be held in 2009; however, the case was continued when Plaintiff did not undergo an independent medical examination as provided in the scheduling order. The Court set a new trial date for Monday, January 25, 2010. Plaintiff failed to appear. She later explained that the reason for her absence was that she “collapsed at the airport” and missed her flight from California on the Friday before trial. Plaintiff claims that she left voice mails for her attorney over the weekend.¹ The attorney did not receive or process the messages before trial. He

¹ The Court recognizes that the facts as represented by the plaintiff would constitute an emergency situation. However, it is poignant that Plaintiff did not contact the Court before trial despite the fact that she was apparently well enough to leave voice messages for her attorney. Moreover, Plaintiff has never submitted documents to substantiate her claim about collapsing at the

appeared at trial and could not explain why his client was absent.

3. Trial was rescheduled for Monday February 14, 2011. However, at the pretrial conference held on January 10, 2011, Plaintiff's attorney (David Arndt, Esquire) indicated that he had been unable to contact his client for several months despite repeated efforts. In light of Plaintiff's past failure to appear and Defendant's concern that Plaintiff had failed to attend a scheduled deposition and independent medical examination, the Court entered an order providing that the case would be dismissed with prejudice unless Plaintiff submitted a signed document indicating that she promised to attend her trial. The promise was due no later than February 1, 2011. Plaintiff did not submit the promise, and the case was dismissed.

4. Plaintiff subsequently submitted a Rule 60(b) motion to vacate default judgment. She claims that she was unaware of the Court's order directing her to submit a promise to appear--despite the fact that her attorney had forwarded notice to her about a month before the deadline. At oral argument on this motion, the Court specifically ordered Plaintiff's attorney to indicate whether he had made efforts to give his client notice of the Court's order. The attorney explained that he left several voice messages for Plaintiff, sent letters by regular and certified mail, and sent emails in an effort to contact her. He even prepared a written promise that she could simply sign and return in order to comply with the Court's order.

5. Plaintiff represented to the Court that she tried to call her attorney, but was

airport. Regardless, the Court granted Plaintiff the benefit of the doubt and was prepared to proceed on a new trial date.

unable to do so. She explained that she apparently left voice messages in the wrong voice mail account at her attorney's law firm. She explained that she has had difficulty communicating with an attorney throughout the representation because her case has been assigned to several different attorneys within the law firm of Weik, Nitsche & Dougherty. She denies receiving any letters from her attorney, and explains that her attorney had been instructed to contact her by telephone rather than mail because she has difficulty receiving mail sent to her address.

Standard of Review

6. Under Superior Court Civil Rule 60(b), the Court may relieve a party of a judgment or order that was obtained on account of, inter alia, mistake, inadvertence, or surprise.² The Delaware Supreme Court has provided six factors for trial courts to consider when determining whether to lift a default judgment that has been entered against a party for failure to comply with the case scheduling order: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.³ Each of these factors will be treated in turn.

² Del. Super. Ct. Civ. R. 60(b).

³ *Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221, 1224 (Del. 2010).

DISCUSSION

7. First, Plaintiff is primarily responsible for her failure to attend trial and submit a signed promise as ordered by the Court.⁴ The Court specifically finds the testimony of Plaintiff's attorney to be credible. He brought the communication problem to the Court's attention at the pre-trial conference. His attempts to contact Plaintiff after the conference were consistent with the Court's order. Mr. Arndt's representations were reinforced by the representations of Defendant's attorney, Brian McNelis, Esquire. Mr. McNelis informed the Court that he had observed opposing counsel's repeated efforts to communicate with Plaintiff over the course of the litigation. He noted that Plaintiff's failure to communicate with her attorney and the Court, as well as her failure to adhere to the scheduling order resulted in modified discovery deadlines. Mr. McNelis represented that his observations have convinced him that the communication problems were caused by Plaintiff rather than by her attorney.

8. Conversely, the Court specifically finds that Plaintiff is not credible. Her history in this case suggests that she has a problem with communication and with deadlines. Plaintiff's failure to take any responsibility for the apparent breakdown in communication with her attorney and with the Court is troubling. For example, even assuming that Plaintiff's excuse regarding her first trial date is true, she might have contacted the Court to give notice that she would be unable to appear. She did

⁴ It should be clear that an attorney has a duty to communicate with his client under Rule 1.4 of the Delaware rules of Professional Conduct. A corollary proposition is that a client has a responsibility to participate in the communication process. The Court views this as a mutual obligation to stay in close communication in order to facilitate the representation.

not do so. Instead, she relied on her attorney receiving and processing a voice mail she left for him over the weekend—before trial began on Monday morning. Then, when her attorney failed to do so, she blames him for not instantly receiving her messages—despite the fact that she is apparently incommunicado in California for months at a time.

9. Second, it would be prejudicial to Defendant to vacate the order dismissing this case. Defendant has met her court-ordered deadlines and was ready for trial. She was afforded finality on this very old cause of action (*circa* 2006) when the case was dismissed with prejudice. That would obviously be destroyed if the case were re-opened. Worse, considering Plaintiff's apparent inability to comply with deadlines or communicate with the Court when she cannot comply, it is entirely possible that Defendant would incur costs to appear again at some future trial date that Plaintiff would not attend.

10. Third, Plaintiff has shown a history of dilatoriness throughout the litigation process. It bears repeating that she did not show up for her own trial and failed to inform the Court of her unavailability until after the fact. Plaintiff's attorney was apparently unable to contact Plaintiff over the course of the several months leading up to the scheduled retrial. She finally contacted him several days after her case had been dismissed because of her failure to provide a written promise to appear. The combination of Plaintiff's history and her incommunicado status in California give the Court serious concern about whether Plaintiff would appear at a new trial date.

11. Fourth, Plaintiff appears to have been very careless about ensuring that she was

informed of the status of her action. If, as she claims, her attorney was responsible for the communication problems that occurred throughout the representation, she should have fired him or taken some other action to take ownership of her cause of action. She did not.

12. Fifth, the case was dismissed because sanctions short of dismissal were ineffective to ensure that Plaintiff would appear at trial. The Court might have dismissed the case with prejudice after Plaintiff failed to appear at her *third* trial date. Instead, the Court decided it was prudent to condition the opportunity for a new trial on the submission of a simple written promise to appear. Plaintiff did not submit the written promise as ordered, and the case was dismissed.

13. The sixth and final *Drejka* factor is the only factor that supports Plaintiff's motion. Plaintiff's cause of action is apparently legitimate. The Court was prepared to hear it on two occasions. That has not occurred because Plaintiff has not complied with court-imposed deadlines. Unfortunately, the result is that an apparently legitimate cause of action has been dismissed.

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CONCLUSION

14. The motion is **DENIED** because dismissal is warranted in light of Plaintiff's repeated, careless, and dilatory failure to comply with court-ordered deadlines.⁵

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Ms. Schrader-VanNewkirk

Gary S. Nitsche, Esquire

Brian T. McNelis, Esquire

⁵ Because Plaintiff is proceeding *pro se*, the Court deems it appropriate to inform her that she has a right to appeal this Order to the Delaware Supreme Court pursuant to Article IV, Section 11 of the Delaware Constitution. Except in matters concerning incompetents or infants, all civil appeals to the Delaware Supreme Court *must* be filed within 30 days after the entry of the order or judgment to be appealed. Failure to file a timely appeal divests the Court of jurisdiction to hear the case. *See Shipley v. New Castle County*, 947 A.2d 1123 (Del. 2008).